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## **DEPARTMENT OF TRANSPORTATION**

### **Federal Highway Administration**

**[Docket No. FHWA—2013–0013]**

### **Proposed Memorandum of Understanding (MOU) Revision Assigning Certain Federal Environmental Responsibilities to the State of California, including National Environmental Policy Act (NEPA) Authority for Categorical Exclusions (CEs)**

**AGENCY:** Federal Highway Administration (FHWA), California Division, DOT.

**ACTION:** Notice of proposed MOU, request for comments.

**SUMMARY:** This notice announces that FHWA and the State of California, acting by and through its Department of Transportation (State), propose to renew and amend an MOU between the parties dated June 7, 2010, pursuant to 23 U.S.C. 326. The MOU would extend the duration of the agreement by three years, continuing the assignment to the State of the FHWA's authority and responsibility for determining whether certain designated activities within the geographic boundaries of the State, as specified in the proposed MOU, are categorically excluded from preparation of an environmental assessment or an environmental impact statement under the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* (NEPA). Aside from editorial changes to the MOU, the following minor changes would also be incorporated: (1) The State would be required to submit a list of CE determinations semi-annually as opposed to quarterly, including Section 4(f) decisions; (2) the Federal Register notice of availability and comment period would be modified from 45 days to 30 days, where applicable; (3) language would be included clarifying that the presence of unusual circumstances and

significant environmental impacts must be considered in CE findings; (4) inclusion of language to clarify that the State coordinate with the Department of Justice and FHWA in the event of litigation, (5) FHWA program reviews would be at no sooner than the 19th month and no later than the 31st month in order to give the State adequate time to implement corrective action plans; (6) future changes to 23 CFR 771.117(c) and (d), in addition to Appendix A resulting from rulemaking would be automatically incorporated into the MOU; (7) the termination provisions of the MOU would be changed to comply with the provisions of Moving Ahead for Progress in the 21st Century (MAP-21).

**DATES:** Please submit comments on or before [INSERT DATE 30 DAYS AFTER PUBLICATION].

**ADDRESSES:** You may submit comments, identified by DOT Document Management System (DMS) Docket Number [FHWA–2013–0013], by any of the methods described below. Electronic or facsimile comments are preferred because Federal offices experience intermittent mail delays from security screening.

1. *Web site:* [http:// www.regulations.gov](http://www.regulations.gov). Follow the instructions for submitting comments on the DOT electronic docket site.
2. *Facsimile (Fax):* 1–202–493–2251.
3. *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Ave., SE., Washington, DC 20590.
4. *Hand Delivery:* 1200 New Jersey Ave., SE., Washington, DC 20590 between 9 a.m. and 5 p.m. Eastern Time, Monday through Friday, except Federal holidays.

For access to the docket to view a complete copy of the proposed MOU, or to

read background documents or comments received, go to [http:// www.regulations.gov](http://www.regulations.gov) at any time or to 1200 New Jersey Ave., SE., Washington, DC 20590, between 9 a.m. and 5 p.m. Eastern Time, Monday through Friday, except for Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** For FHWA: Mr. Shawn Oliver; by e-mail at [shawn.oliver@dot.gov](mailto:shawn.oliver@dot.gov) or by telephone at (916) 498-5048. The FHWA California Division Office's normal business hours are 8 a.m. to 4:30 p.m. (Pacific Time), Monday through Friday, except for Federal Holidays. For State: Mr. Dale Jones; by e-mail at [dale\\_jones@dot.ca.gov](mailto:dale_jones@dot.ca.gov); by telephone at (916) 653-5157. The California Department of Transportation's normal business hours are 8 a.m. to 4:30 p.m. (Pacific Time), Monday through Friday, except for State and Federal holidays.

#### **SUPPLEMENTARY INFORMATION:**

##### **Electronic Access**

An electronic copy of this notice may be downloaded using a computer, modem, and suitable communications software from the Government Printing Office's Electronic Bulletin Board Service at (202) 512-1661. Internet users may reach the Office of the Federal Register's home page at <http://www.archives.gov> and the Government Printing Office's Web site at <http://www.access.gpo.gov>. An electronic version of the proposed MOU may be downloaded by accessing the DOT DMS docket, as described above, at <http://www.regulations.gov> or at [http://www.dot.ca.gov/hq/env/nepa\\_pilot/html/categorical\\_exclusion.htm](http://www.dot.ca.gov/hq/env/nepa_pilot/html/categorical_exclusion.htm).

##### **Background**

Section 326 of title 23, United States Code (23 U.S.C. 326), allows the Secretary of the DOT (Secretary), to assign, and a State to assume, responsibility for determining

whether certain designated activities are included within classes of action that are categorically excluded from requirements for environmental assessments or environmental impact statements pursuant to regulations promulgated by the Council on Environmental Quality under part 1500 of title 40, Code of Federal Regulations (CFR) (as in effect on October 1, 2003). The FHWA is authorized to act on behalf of the Secretary with respect to these matters.

The FHWA and the State had previously entered into an MOU on June 7, 2007, for an initial term of three (3) years and was subsequently extended for another three (3) years set to expire on June 7, 2013. The proposed renewed and amended MOU will replace the existing MOU and be in effect for an additional three (3) years. Stipulation I (B) of the MOU describes the types of actions for which the State would assume project-level responsibility for determining whether the criteria for a CE are met. Statewide decision-making responsibility would be assigned for all activities within the categories listed in 23 CFR 771.117(c), those listed as examples in 23 CFR 771.117(d) and additional actions identified as Appendix A, including any added to those sections by FHWA after the date of the new MOU.

The MOU also assigns to the State the responsibility for conducting Federal environmental review, consultation, and other related activities for projects that are subject to the MOU with respect to the following Federal laws and Executive Orders:

1. Clean Air Act (CAA), 42 U.S.C. 7401–7671q (determinations of project-level conformity if required for the project).
2. Compliance with the noise regulations in 23 CFR 772.
3. Section 7 of the Endangered Species Act of 1973, 16 U.S.C. 1531–

1544, and Section 1536.

4. Marine Mammal Protection Act, 16 U.S.C. 1361.
5. Anadromous Fish Conservation Act, 16 U.S.C. 757a–757g.
6. Fish and Wildlife Coordination Act, 16 U.S.C. 661–667d.
7. Migratory Bird Treaty Act, 16 U.S.C. 703–712.
8. Magnuson-Stevens Fishery Conservation and Management Act of 1976,  
as amended, 16 U.S.C. 1801 *et seq.*
9. Section 106 of the National Historic Preservation Act of 1966, as  
amended, 16 U.S.C. 470(f) *et seq.*
10. Section 4(f) of the Department of Transportation Act of 1966, 23 U.S.C.  
138 and 49 U.S.C. 303; and 23 CFR part 774.
11. Archeological and Historic Preservation Act of 1966, as amended, 16  
U.S.C. 469–469(c).
12. American Indian Religious Freedom Act, 42 U.S.C. 1996.
13. Farmland Protection Policy Act (FPPA), 7 U.S.C. 4201–4209.
14. Clean Water Act, 33 U.S.C. 1251– 1377 (Section 404, Section 401,  
Section 319).
15. Coastal Barrier Resources Act, 16 U.S.C. 3501–3510.
16. Coastal Zone Management Act, 16 U.S.C. 1451–1465.
17. Safe Drinking Water Act (SDWA), 42 U.S.C. 300f–300j–6.
18. Rivers and Harbors Act of 1899, 33 U.S.C. 401–406.
19. Wild and Scenic Rivers Act, 16 U.S.C. 1271–1287.
20. Emergency Wetlands Resources Act, 16 U.S.C. 3921–3931.

21. TEA–21 Wetlands Mitigation, 23 U.S.C. 103(b)(6)(m), 133(b)(11).
22. Flood Disaster Protection Act, 42 U.S.C. 4001–4128.
23. Land and Water Conservation Fund (LWCF), 16 U.S.C. 4601–4604 (known as section 6(f)).
24. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601–9675.
25. Superfund Amendments and Reauthorization Act of 1986 (SARA).
26. Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901–6992k.
27. Landscaping and Scenic Enhancement (Wildflowers), 23 U.S.C.
28. Executive Orders Relating to Highway Projects (E.O. 11990, Protection of Wetlands; E.O. 11988, Floodplain Management; E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations; E.O. 11593, Protection and Enhancement of Cultural Resources; E.O. 13007, Indian Sacred Sites; E.O. 13175, Consultation and Coordination with Indian Tribal Governments; E.O. 13112, Invasive Species).

The MOU allows the State to act in the place of the FHWA in carrying out the functions described above, except with respect to government-to-government consultations with federally recognized Indian tribes. The FHWA will retain responsibility for conducting formal government-to-government consultation with federally recognized Indian tribes, which is required under some of the above-listed laws and executive orders. The State also may assist the FHWA with formal consultations, with consent of a tribe, but the FHWA remains responsible for the consultation. This

assignment includes transfer to the State of California the obligation to fulfill the assigned environmental responsibilities on any proposed projects meeting the Criteria in Stipulation I(B) of the MOU that were determined to be CEs prior to the effective date of the original MOU but that have not been completed as of the effective date of the MOU.

The FHWA California Division, in consultation with FHWA Headquarters, will consider the comments submitted when making its decision on the proposed MOU revision. Any final MOU approved by FHWA may include changes based on comments and consultations relating to the proposed renewed and amended MOU. Once the FHWA makes a decision on the proposed MOU revision, the FHWA will place in the DOT DMS Docket a statement describing the outcome of the decision-making process and a copy of any final MOU. The FHWA also will publish in the Federal Register a notice of the FHWA decision and the availability of any final MOU. Copies of the final documents also may be obtained by contacting the FHWA or the State at the addresses provided above, or by viewing the documents at:

<http://www.dot.state.ak.us/stwddes/desenviron/resources/6004.shtml>

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

**Authority:** 23 U.S.C. 326; 42 U.S.C. 4331, 4332; 23 CFR 771.117; 40 CFR 1507.3, 1508.4.

Issued on: April 2, 2013

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Vincent P. Mammano, Division Administrator, Sacramento, California

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